QUESTION PRESENTED

Whether an employee of the National Security Agency, dismissed "in the interests of national security" is entitled to a hearing pursuant to 5 U.S.C. 7532, when the summary termination authority in 50 U.S.C. 833 is not invoked.

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STATUTORY PROVISIONS INVOLVED

In addition to the statutes and regulations cited by the Petitioners, Executive Order 10450 of April 27, 1953, 18 FR 2489, 3 CFR 936 (1949-1953 Comp.), and Chapter 371 of NSA Personnel Management Manual 30-2, both apply and are set out at App. 1(b)-8 (b) and 9 (b) - 15(b) of Respondent's Opposition to Petition For A Writ of Certiorari.(Opp. App.)[1]

STATEMENT

A. The Statutory And Regulatory Framework

The National Security Agency Act of 1959, 50 U.S.C. 402 note (the 1959 NSA Act) gave the Secretary of Defense, or his designee, the power "to establish such positions, and to appoint thereto, without regard to the civil service laws, such officers and employees * * * as may be necessary to carry out the functions of" NSA (C. A. App. 46).

The Act is silent as to the authority of the Secretary of Defense, or his designee, to terminate the employment of officers and employees in positions at the NSA. The Act contains many administrative authorities regarding personnel and employment at that Agency.[2]

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[1] "C.A. App." refers to the Joint Appendix filed in the Court of Appeals, copies of which have been lodged with the Clerk. Most other record references are contained in the Appendix to the Government's Petition for Certiorari ("Pet. App."), and others in Respondent's opposition thereto ("Opp. App.").

[2] Section 12(a)(1)(E) (C.A. App. 52) does provide for removal or suspension of senior civilian cryptologic personnel in the Senior Cryptologic Executive Service. While this is not applicable to the case at hand, the fact that such removal authority is reserved to the Secretary of Defense and not delegated to the Director of NSA is support for Respondent's position here.

The Secretary of Defense delegated some of his authority under the 1959 NSA Act to the Director of NSA in DoD Directive No. 5100.23 (C.A. App. 56-59). This DoD Directive contains no delegation of authority to NSA to terminate employment "for such cause as will promote the efficiency of the service" or in the interest of national security, yet it provides other delegations of authority regarding the personnel security responsibilities of the Director of NSA. In fact, under 5100.23, termination authority in the interest of national security is expressly withheld:

> 10. Authorize the suspension, *but not to terminate the services of an employee in the interest of national security* in positions within the NSA, in accordance with the provisions of 5 U.S.C. 3571, 5594, 7312, 7532, Executive Order 10450, dated April 27, 1953, as amended, and DoD Directive 5210.7, dated September 2, 1966. (Emphasis added.) (C.A.App. 62.)

The NSA regulations promulgated to implement the personnel aspects of the aforesaid Act and DoD Directive are set forth in the NSA Personnel Management Manual (NSA/PMM) 30-2 (August 12, 1980). Chapter 370 thereof sets forth the general standards and procedures for removing an employee (Pet. App. 36a -43a). Chapter 370 clearly does not apply to "a suspension or removal taken in the interest of national security." (Sec. 3-2(a) Pet. App. 38a.) It does apply only to "actions . . . for such cause as will promote the efficiency of the service." (Sec. 1-2 "Authority of the Agency," C.A. App.66.)[3]

Chapter 371 of the aforesaid NSA regulations prescribes the policies and procedures governing actions to

[3] This regulation cites no statutory authority nor does it cite any DoD Directive for authority to remove personnel.

limit access to classified information, suspend and/or terminate civilian personnel of NSA *for reasons of national security.* This part of the NSA regulations expands the procedural rights afforded in Chapter 370 above in that an NSA employee can be terminated for reasons of national security only by the Secretary of Defense; can request a hearing by a duly constituted agency authority; is entitled to a review of his case by the Secretary of Defense and a written statement of the Secretary's decision. Further, prior to preparation of the letter of charges proposing termination, NSA is required to consult with the General Counsel of the Department of Defense (Opp. App. 9b-15b).[4]

While Chapter 370 does provide a standard for removal of NSA employees, it clearly cannot apply to a suspension or removal taken in the interest of national security (Pet. App. 38a). Petitioners are correct in stating that non-veterans such as Respondent herein, have no right of appeal to the Merit System Protection Board. However, if they are being terminated for security reasons, they do have a right to a hearing and review at the level of the Secretary of Defense as shown above (Opp. App. 10b-13b).

As noted by Petitioners, a more vigorous personnel screening process is necessary at NSA. All NSA employees are cleared at the level of Sensitive Compartmented Information (SCI). (See Footnote 3 of Petitioner's Brief, p. 4.) Because of this, Congress provided for summary termination authority in 50 U.S.C. 833 (a) (C.A. App. 71). Petitioners did not use this authority in removing Doe,

[4] This regulation cites, *inter alia*, the following authority: 5 USC, Section 7532, as amended: P.L. 88-290 (codified as 50 USC 831 *et seq.*); P.L. 89-380 "the Back Pay Act of 1966"; DoD Directive 5210.8 and E.O. 10450 (Opp. App. 10b).

who had access to SCI information as part of his duties as a Cryptographic Material Control Technician, and occupied a sensitive position designated as such in the interests of national security (C.A.App. 42).

Congress made other provisions for personnel security at NSA in 50 U.S.C. 831-835 (C.A. App. 70-72), including the specific termination authority in 50 U.S.C. 833. The Department of Defense and NSA implementation of the authorities, policies and standards, and indeed all aspects of 50 U.S.C. 831 *et seq.* are spelled out rather clearly in Chapter 371 of the NSA Personnel Management Manual (Opp. App. 9b-15b). This includes implementation of the statutory direction to the Secretary of Defense that no person is to be employed by NSA, or granted access to classified information, unless such employment or access is "clearly consistent with the national security" (50 U.S.C. 831). Chapter 370 of the NSA Personnel Management Manual has not a single provision implementing this statutory standard of security clearance or any other provision of 50 U.S.C. 831 et seq. (C.A. App. 66-69). Chapter 370 does not provide that this statutory standard for clearance is to be included in the inherent authority claimed in Section 1-2 thereof. Nor does it provide in that same paragraph that action taken "for such cause as will promote the efficiency of the service" encompasses implementation of the statutory standard Congress imposed in 50 U.S.C. 831 ("clearly consistent with the national security").

B. The Facts and Proceedings Below.

Respondent became employed with the National Security Agency (NSA) in April of 1968. He was promptly cleared for access to Sensitive Compartmented Information (SCI). His work received overall ratings of "Excellent" in the years 1978 through 1980. Respondent received an "outstanding" rating in 1981 for implementation of security regulations and maintenance of records. (C.A.App. 6-7, 16-17.) In his employment at NSA, Respondent had an "indefinite appointment." He had "completed his probationary or trial period" and "is (and has been at all times) a citizen of the United States" (see 5 U.S.C. 7532(c) (1-3)).

In the course of a drug investigation at NSA,[5] in March 1982, Respondent voluntarily described two NSA-approved vacation trips to Haiti and one to Santo Domingo, where he had engaged in short, one-time, unrepeated-with-the-same individual, homosexual acts with three *unidentified* males. (C.A.App. 123, 124.)

The record does not show any investigative effort by NSA to identify and ascertain the citizenship of these unidentified males. Nevertheless, Respondent received a notice of proposed action to remove him from his NSA position because his "continued access to SCI" was not "clearly consistent with the national security." (C.A. App. 83.) The record contains no proof that Respondent's associations were with foreign nationals as opposed to vacationing U.S. citizens. He denied under oath any knowledge that these persons were foreign nationals. (C.A.App. 134, 144.) Nowhere in the record is there even one allegation that Respondent ever disclosed classified information to foreign nationals or to any unauthorized person.

Respondent offered to undergo interviews and examinations by NSA psychiatrists to demonstrate he was not

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[5] Respondent was found to have *no* involvement with illicit drugs and Petitioners never have contended otherwise.

a security risk. An NSA contract psychiatrist examined Respondent and rendered a generally favorable report, which indicated that his "diagnosis cannot be established firmly without more extensive clinical interviewing and psychological testing" (C.A.App. 105). He did not consider Respondent's homosexuality to be "a mental disorder." *Id.*

On January 3, 1983, a Board of Appraisal had been convened by the Director, NSA, to appraise Respondent's loyalty and his suitability for access to classified information pursuant to Public Law 88-290 (50 U.S.C. 831). Unbeknownst to Respondent or his counsel, the Board of Appraisal requested a second report from its psychiatrist. Without conducting any additional interviewing or testing, this psychiatrist filed a second report generally unfavorable to Respondent (C.A. App. 109-117).

Thereafter, the Board of Appraisal concluded that Respondent's "access to classified information is clearly inconsistent with the national security." (C.A. App. 108.)

Because the Board based its findings on the second report by the NSA contract psychiatrist and ignored his first report, Respondent sought a separate psychiatric review of the two NSA reports by a well-qualified, independent psychiatrist. (C.A.App. 181.) This psychiatric review was part of Respondent's submission to the Director of NSA, which highlighted the inconsistent and contradictory aspects of the two NSA evaluations. Respondent criticized the second NSA psychiatric report as containing inaccuracies, speculation, and use of hypothetical situations rather than facts in drawing its unfavorable conclusions (C.A. App. 136-139).

Despite NSA regulations requiring specific reasons for the proposed adverse employment action (Ch. 370.3 and

371.2), (C.A. App. 67, 230), the NSA Director terminated Respondent for reasons for which Respondent had never received prior notice. (See C.A. App. 191-192).

> d. The argument that four brief, short-lived homosexual acts five - six years ago in Haiti and one and one half - two years ago in Santo Domingo offer little risk of blackmail rather obviously overlooks an admitted record of well over 100 other similarly casual (hence indiscriminate (and promiscuous)) homosexual acts. Frankly it is the indiscriminate pattern of activity which invites the risk of security exploitation rather than the specific homosexuality of it.

This final decision of the Director thus terminated Respondent for his overall lifestyle and not on the basis of the "specific reasons" included in the 1982 NSA notice of proposed action (C.A. App. 82-84). Respondent never received the final decision quoted above until the filing of the Government's Motion for Summary Judgment in the District Court. Petitioner was thus denied an opportunity to answer and have benefit of counsel with regard to this reason for his termination.

The Director, NSA, by letter dated February 21, 1984, advised Respondent that his employment would be terminated effective March 9, 1984, because his "access to classified information is not clearly consistent with the national security" (C.A.App. 193). Never in the record in this case does language appear that Respondent was terminated "only for such cause as will promote the efficiency of the service." Respondent then repeatedly requested that Petitioners afford him a hearing by a duly-constituted authority, as provided in 5 U.S.C. 7531 and 7532 prior to termination of his employment. Both Petitioners refused these requests for a hearing (C.A. App. 216-225).

Respondent filed a Complaint for Declaratory and Injunctive Relief, in U.S. District Court, complaining, *inter alia*, that his employment with NSA of sixteen years duration was unlawfully and unreasonably terminated and that he had been denied his statutory right to "a hearing by an agency authority duly constituted . . . under 5 U.S.C. 7532." The District Court granted Petitioners' Motion for Summary Judgment (C.A. App. 32). Appeal to the District of Columbia Circuit followed. That Court reversed, holding that Respondent is entitled to an administrative hearing under 5 U.S.C. 7532. The remainder of the District Court's decision was vacated, without any opinion on the ultimate disposition of Respondent's remaining statutory and constitutional claims. The action was remanded to the District Court for an appropriate order directing the Secretary of Defense to act pursuant to 5 U.S.C. 7532. *Doe* v. *Weinberger*, 820 F.2d 1275 (1987). The Government's Petition for Writ of Certiorari was granted on February 29, 1988.

SUMMARY OF ARGUMENT

It is clear that throughout the course of the administrative proceedings Respondent was denominated a security risk. At no time was he suspended or dismissed "only for such cause as will promote the efficiency of the service," but always as a person whose continued access to classified information is not clearly consistent with the national security." (Termination Letter, C.A. App. 193.) Respondent's position at NSA, wherein he had to have not only access to Sensitive Compartmented Information (SCI), but also control of SCI, made him a member of the class of government employees to which the National Security Act of 1950 and its procedures in 5 U.S.C. 7532 applied. The sensitive mission of NSA, Respondent's access to classified information and the administrative

standard used to terminate Respondent's employment made this a case concerning "national security" within the meaning of this Court's decision in *Cole* v. *Young*, 351 U.S. 536 (1956). Accordingly, Respondent was denied the specific statutory protections afforded an employee accused of being a security risk, which include a hearing by an agency authority duly constituted and a review of his case by the Secretary of Defense or his designee.

The Government's position that Respondent's termination was "for cause" is heard for the first time in this Court. The Government chose to litigate both in the District Court and in the Circuit Court of Appeals on the unreviewability of the revocation of a security clearance. A security clearance case is a security risk case, and a security risk cannot be cleared because of the danger to national security. Having lost below, Petitioners should not be allowed to assert, for the first time in this Court, its "for cause" theory. A similar tactic was rejected long ago by this Court in *Vitarelli* v. *Seaton*, 359 U.S. 535, 545-46 (1959).

By its express terms, 5 U.S.C. 7532 mandates a termination hearing and review at Secretary of Defense level in this case. Not only is the Congressional Directive in Section 7532 clear, but also Executive Order 10450 compels the hearing and department head review that the Court of Appeals said was mandated in Respondent's case. The Government's "three separate procedural routes" argument is belied by NSA's administrative practice in this case. Its attempt to suggest that the termination here took place only pursuant to the 1959 NSA legislation fails when it is seen that a Board of Appraisal, pursuant to the 1964 NSA Act, was here utilized. The reliance on Chapter 370 of NSA regulations alleged by Petitioners to stem from its inherent power to hire cannot sustain the termi-

nation of employment in this case because the standard in Chapter 370 was never utilized. Rather the security standard of Chapter 371 (regulations to implement 5 U.S.C. 7532 and E. O. 10450) was, in fact, relied upon administratively by NSA in terminating Respondent. In addition, the 1959 Act requires a delegation of authority from the Secretary of Defense to the Director of NSA. By DoD Directive No. 5100.23, the Secretary of Defense expressly withheld from the Director of NSA the power to terminate an NSA employee on national security grounds. Finally, in this regard, the Government's argument based on implied termination authority stemming from the power to hire and appoint, if accepted, would constitute a repeal by implication of the 1950 Act (7532), a legislative construction which is not favored by the judiciary.

Petitioner's complaint in this case is a problem of their own doing. Had they sought to terminate Respondent for cause, they could have fairly administratively considered the merits of any alleged "cause" below and permitted Respondent to test the same. Having chosen to avoid any substantive issue of cause by merely declaring Respondent a security risk, NSA and the Department of Defense must honor the Congressional mandate of procedures that accompany security cases. If, indeed, Congress had given the Director of NSA power to terminate in security cases by its 1959 NSA legislation, Congress would not have explicitly recognized the existence of 7532 appeal rights in passing legislation in 1964, which gave the Secretary of Defense summary termination authority (not utilized here).

Although Respondent submits that the plain language of 5 U.S.C. 7532 makes resorting to legislative history unnecessary for affirmance of the D.C. Circuit here, a

complete review of the involved legislative history demonstrates (1) that Congress intended that all employees (including those in the excepted service) have departmental-level hearing and review rights in security cases; (2) that minor indiscretions of the type Respondent was accused of here, as opposed to disloyalty, were felt by Congress to trigger 7532 rights; (3) that review by the Secretary of Defense was made mandatory as the result of a Congressional compromise to avoid Civil Service Commission involvement in security cases; and (4) appeal to the Agency head (here the Secretary of Defense) was intended to insure fairness by virtue of the political accountability of that high office to the President and the Congress.

For several reasons, this Court's recent decision in *Egan* v. *Department of Navy*, ___ U.S. ___ (No. 86-1552 Feb. 23, 1988) is distinguishable. Most important, this Court, in that case, specifically stated it was not purporting to decide the issue of whether or not 7532 hearing and review were mandatory in a case such as this.

Finally, if the Government's position on the application of 7532 is accepted, NSA's termination of Respondent runs afoul of administrative due process problems of constitutional dimension. NSA takes the position that it terminated Respondent for cause under Chapter 370 of its regulations. The record, however, consistently shows that his case was judged on an administrative standard of whether or not his continued access to SCI was clearly consistent with national security. Such a standard is not contained in Chapter 370, but only in Chapter 371, which was never invoked by NSA and which is expressly intended to implement Executive Order 10450 and to give an employee charged as a security risk rights akin to those found in Section 7532.

ARGUMENT

I. AS A MATTER OF LAW AND FACT, RESPONDENT WAS TERMINATED FOR "NATIONAL SECURITY" REASONS AS OPPOSED TO "CAUSE," AND HAVING LITIGATED IN THE LOWER COURTS ON A NATIONAL SECURITY THEORY, RESPONDENT MAY NOT NOW SWITCH TO A NEW THEORY.

A. Petitioner's Firing Was for "National Security" Reasons As Such Term Was Defined in *Cole* v. *Young*.

In the District Court in this case, Petitioners filed a sworn declaration by NSA's Deputy Director of Administration, Mr. Louis J. Bonnani (C.A.App. 39-45). In paragraph 4, he stated:

> Congress . . . recognized the extremely sensitive nature of employment at NSA by enacting a statute (P.L. 88-290) prescribing the personnel security procedures at NSA (50 U.S.C. Sections 831-835) . . . This Act creates a mandatory standard for employment at NSA. Section 831 states that: . . .
>
> > (1) that no person shall be employed in or detailed or assigned to, the National Security Agency . . . or continue to be so employed, detailed, or assigned; and
> >
> > (2) that no persons so employed, detailed, or assigned shall have access to any classified information;
>
> unless such employment, detail, assignment, or access to classified information is clearly consistent with the national security.

Mr. Bonnani then goes on to describe the required clearance at NSA for "Sensitive Compartmented Information (SCI)" . . . "data about sophisticated technical systems for collecting intelligence and the information collected by those systems" which is "extremely sensitive and fragile." Clearance for "Secret or even Top Secret" does not automatically guarantee SCI access approval (*Id.* 41).[6]

The article "SCI Characteristics" was set out by way of appendix to that brief of the Government, and in this Court appears at Pet. App. 44a-51a. The article refers, *inter alia*, to "classic espionage operations;" neutralization of SCI as "akin to the loss of a whole agent network;" "risks to the national security attendant to a lack of knowledge of what our adversaries are up to" (Pet. App. 47a); "the lessons of Pearl Harbor;" "extraordinary sensitivity and fragility from a security standpoint" (Pet. App. 48a); "the security of our secrets depends . . . upon every person granted access;" "our security can be breached" (Pet. App. 51a). Read in its entirety, this document leaves no doubt that we are here concerned with the type of security risk this Court held to trigger 5 U.S.C. 7532 in *Cole* v.

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[6] In its brief in the Court of Appeals, pp. 3-4, Justice Department counsel emphasized the national importance of the security clearance at issue in this case as follows:

> NSA's mission includes the collection of information from foreign electromagnetic signals in order to provide current, nearly instantaneous and highly reliable foreign intelligence information to the intelligence community of the government and to national policymakers. Equally important to NSA's mission is the protection of signals intelligence (JA 40, Para. 3). See also Executive Order 12333, Sec. 1. 12(b).
>
> The methods NSA uses to carry out this mission, as well as the intelligence product, fall within the especially sensitive category of classified information identified as Sensitive Compartmented Information or SCI. SCI includes "data about sophisticated technical systems for collecting intelligence and the information collected by those systems." See "Sensitive Compartmented Information: Characteristics and Security Requirements," prepared by The Security Committee, Director of Central Intelligence, June 1984, 1 (hereafter cited as "SCI, Characteristics"). (Footnote omitted.) "Communications intelligence * * * is the classic example of SCI * * * "(*id.* at 2).

Young, 351 U.S. 536 (1956). Accordingly, the Court is referred to this article in its entirety.

Respondent was a Cryptographic Material Control Technician at NSA and as such had access to and control of some of the most confidential and sensitive documents in that agency's intelligence-gathering function (C.A. App. 42). Given the mission of the National Security Agency and Respondent's sensitive position there, it cannot be reasonably argued that the revocation of his security clearance and his termination were done on other than national security grounds. Indeed, the Director of NSA convened a Board of Appraisal pursuant to 50 U.S.C. 832(b), which "board shall appraise the loyalty and suitability of persons for access to classified information" (C.A. App. 71).

Finally, the Director of NSA formally terminated Respondent with words "while I find much attractive about (Doe) and his work record and performance, I also find him significantly flawed in his off-duty behavior and a potential security risk" (C.A. App. 192). His February 21, 1984 termination was because Respondent's "access to classified information is not clearly consistent with the national security" (C.A. App. 193).

In 1955, this Court settled the meaning of the term "national security" in this context in *Cole* v. *Young*, 351 U.S. 536 (1956). Referring to the National Security Act of 1950 (the same statute at issue here), *Cole* held that "those activities of the Government that are directly concerned with the protection of the Nation from internal subversion or aggression" are within the purview of the 1950 Act (351 U.S. at 544). The court found it significant that eleven agencies, including the one at issue here, the Department of Defense, were specifically singled out as

being subject to the Act *(Id). Cole* gave an example of "security risks" as those "employees having access to classified materials" (351 U.S. at 550).[7]

Certainly, Respondent's position was the type of employment felt to be "sensitive" which "could bring about . . . discernable adverse effects on the Nation's security," (351 U.S. at 546). See this Court's citation of legislative history for the meaning of the words "security risks" that would trigger 7532 application. At 351 U.S. 550, this Court quoted Mr. Larkin, a representative of the Department of Defense, which department had requested and drafted the bill:

> They are security risks because of their access to confidential and classified material. * * * But if they do not have classified material, why, there is no notion that they are security risks to the United States. They are security risks to the extent of having access to classified material.[14]

[14] Hearings, House Committee on Post Office and Civil Service, on H.R. 7439, 81st Cong., 2d Sess., p. 67.

Thereafter, this Court quoted from further legislative history to the effect that the Act was not intended to apply to employees "not in sensitive job(s) . . . (who) cannot prejudice our security because he does not have access to any of the classified or top secret material." *Id.* at 72. Accordingly, the Court relied upon the precise factor of "access to classified information" that makes

[7] The court quoted significant portions of the legislative history of the National Security Act, all of which support Respondent's position here.

Doe's employment so clearly distinguishable from that of HEW's food and drug inspector at issue in *Cole*..

As a matter of fact from the record and as a matter of law under *Cole* v. *Young*, Respondent's termination here was on "national security" grounds and not "for cause" as is alleged for the first time in this Court.

B. Having Litigated Both In The District Court And The Court Of Appeals On the Theory That This Was A "National Security Case" And Having Generated Two Federal Court Opinions That Treated The Case As Such, The Government Is Now Precluded From Disavowing Its Theory And Treating The Matter As Merely One Of A Termination For "Cause".

In a strategic effort to reshape its theory of the case, the Government, for the first time in this Court, casts the question as "whether an employee of NSA who fails to maintain a required security clearance for access to classified information can be removed 'for cause' without invocation of 5 U.S.C. 7532 or 50 U.S.C. 833." While it argued in favor of inherent authority to terminate employment, the Government's lengthy Motion for Summary Judgment in the District Court and its brief in the Court of Appeals will be searched without success for any mention of the words "for cause" as a reason for Respondent's termination at NSA. Indeed, its lengthy arguments below espousing non-reviewability of security clearance decisions are, to a large extent, at odds with the position that this is not a "national security case" as defined by *Cole* v. *Young*. Both the opinion of the District Judge and the D.C. Circuit never mentioned the words "for cause" and never dealt with any government argument that Doe was fired for cause as opposed to national security grounds.[8]

[8] The court of Appeals expressly did find that "(t)he agency's own justification for . . . terminating Respondent's employment at NSA was "national security," within the meaning given that term by . . ." *Cole* v. *Young*. (Pet. App. 8a). That Court cited the Director's decision to terminate and the Board of Appraisal recommendation (C.A.App. 192 and 108).

Traditionally, this Court has insisted that a litigant present only legal theories that were considered by lower courts. Where the ground of defense has not been brought to the attention of the lower court, this Court is not at liberty to consider the questions. *Bell* v. *Bruen*, 1 How. 169, 187 (1843); *Thomas* v. *Taylor*, 224 U.S. 73, 84 (1912); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 374 n. 5 (1967); *Dothard* v. *Rawlinson*, 433 U.S. 321, 340 (1977) (opinion of Mr. Justice Renquist with whom Chief Justice Burger and Mr. Justice Blackman joined concurring in the result and concurring in part). *Schenfield* v. *Norton*, 391 F.2d 420, 424 (10th Cir. 1968).

II. CONGRESS MANDATED A HEARING, PURSUANT TO 5 U.S.C. 7532, WHEN NSA TERMINATES AN EMPLOYEE "IN THE INTEREST OF NATIONAL SECURITY" WITHOUT INVOKING 50 U.S.C. 833.

A. Administrative Practice and Congressional Intent Dictate Affirmance.

The Government's brief (pp. 14-15) argues that NSA has three distinct "procedural paths" or options in terminating an employee. Without supporting authority, it is argued that these distinct routes are entirely "different" in "historical origin" and the "groups of Federal employees" to which they apply. Conceding that all three of the procedural options apply to employees of NSA, the thrust of the argument is that once an option is selected by NSA, that option's distinct procedures are employed and no other, regardless of broad language utilized by Congress

and (apparently) regardless of how NSA itself treats the particular case.

This argument fails for a number of reasons:

1. Executive Order 10450, in Section 5 (C.A. App. 250), states that cases where employment "may not be clearly consistent with the interests of the national security," *shall* be reviewed or re-adjudicated in accordance with 5 U.S.C. 7532. The NSA regulation, last mentioned above (Chap. 371, C.A. App. 227-233), was promulgated to implement E. O. 10450 and 5 U.S.C. 7532. E. O. 10450 thus mandates use of 5 U.S.C. 7531 and 7532 procedures when an employee is to be discharged for security reasons.

2. If indeed we accept for the sake of argument that the procedural routes can be considered distinct, NSA mixed the procedural routes in this case. Specifically, a Board of Appraisal, pursuant to 50 U.S.C. 832(b), was established to advise the Director whether or not Respondent was a security risk. That extraordinary security step having been taken, the "distinct procedural path argument" is defeated by the record in this case. The Government concedes 50 U.S.C. 833(a), the Secretary's summary termination authority, was not utilized. The Government's "separate and distinct procedural path" argument cannot adequately explain why a companion section of that same 1964 Act (Sec. 832(b)) was used in this case, which, it alleges, was on a different procedural track.

3. Although there was passing reference to Chapter 370 of the NSA regulations in the notice of termination sent to Respondent, the term "for cause" was never utilized, and the regulatory standard thereunder, "only for

such cause as will promote the efficiency of the service,"[9] was never addressed in any administrative action concerning Respondent's removal.[10] Instead, as pointed out in Argument I.A., *infra*, the terms "clearance not consistent with national interest" and "national security" and "security risk" were repeatedly utilized. Accordingly, by the very language utilized by NSA in its treatment of Respondent, the Solicitor General's argument is defeated.

4. Once the focus of the dismissal is "in the interest of national security," the Secretary of Defense has expressly withheld the power of the Director of NSA to terminate the employee at issue. In discussing the statutory and regulatory framework, the Government brief (p. 2) acknowledges that the National Security Act of 1959 (50 U.S.C. 402 note) gave "the Secretary of Defense, or his designee, the power to establish such positions, and to appoint thereto, without regard to civil service laws, such officers and employees * * * as may be necessary to carry out the functions of such agency." DoD No. 5100.23 is the operative delegation of authority from the Secretary of Defense to the Director of NSA under the 1959 Act. As set out on page 2 of this brief, "Statutory and Regulatory Framework," Paragraph 10 of said directive expressly withholds authority from the Director of NSA "to terminate the services of an employee in the interest of national security in positions within the NSA, * * *." Accordingly, any inherent authority in a security case stemming from

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[9] Ch. 370 NSA PMM 30-2, Sec. 1-2 (C.A. App. 66).

[10] As emphasized elsewhere in this brief, the only standard addressed administratively was "whether access to information would be clearly consistent with the national security." (Compare 50 U.S.C. 831 (Pet. App. 32a) with C.A. App. 108 and 191).

the power to appoint is defeated. All of the cases on which the Government relies in its "inherent or implied authority argument" recognize the exception to that rule when there exist express statutory or regulatory provisions to the contrary.[11] Given the regulatory provision to the contrary, the Government's principal argument fails.

5. Again, assuming *arguendo* that "distinct procedural paths" exist, the Government has manipulated the different procedures for its own purposes. The record undisputedly shows that for fourteen years Respondent was an exemplary employee and received "excellent" or "superior" ratings in his job performance. Only when he voluntarily revealed his homosexuality did the Government seek to remove him. Throughout the administrative proceedings and in the District Court, Respondent maintained that sexual preference was not related to job performance and that such a factor was an impermissible reason for termination. Rather than candidly face such an issue with political, civil rights, and constitutional overtones, NSA administratively chose to make this a security clearance case, thus avoiding the sexual preference issue. Had it, in Respondent's view, faced the true reason for dismissal, the Government, arguably, could have proceeded on a "for cause" basis. NSA did not do this, and consequently was "hoist on its own petard" when it made the matter one of national security. As argued above, courts should not allow litigants to flip-flop on legal theories, misleading lower courts and espousing new theories for the first time on appellate review. Similarly, it should

[11] At pp. 15-16 of its brief, the Government acknowledges such "as a general matter, the power to fire is, *unless expressly circumscribed*, inherent in the power to hire." (Emphasis added.) E.g., see *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

be beneath the dignity of the Government to elect one method of termination only to thereafter disavow that election when the employee successfully asserts hearing rights given him by Congress. In *Vitarelli* v. *Seaton*, 359 U.S. 535, 539, 545-46 (1959), this Court disallowed an amazingly similar Government disavowal of its procedural protections in a security case. It should do so again.[12]

6. The Government's inherent authority argument in favor of a termination power in the Director of NSA pursuant to Chapter 370 of its regulations is totally dependent on the 1959 Act establishing NSA (50 U.S.C. 402 note). However, Congressional legislation subsequently enacted proves this argument erroneous. In 1964, Congress passed 50 U.S.C. 833 (the summary termination authority of the Secretary of Defense). This 1964 Act expressly recognized that it was dispensing with the existing requirement of procedures (and hearing) pursuant to 5 U.S.C. 7532 by utilization of the following language:

[12] The concern, at the conclusion of the Government's brief (p. 40) that mandatory 7532 procedures in security cases will enmesh the courts in disputes over whether a removal was or was not on national security grounds is easily cured by an accurate and candid formal notice, either including or excluding national security as the basis of personnel action. Thereby any possible ambiguity would be eliminated. This will not only clarify the proceedings for the purpose of determining whether Section 7532 is applicable, but will also protect the employee against the stigma of having been discharged on national security grounds.

In any event, the possibility that there may be some doubt in this regard in other cases provides no justification for giving Section 7532 less than its congressionally intended effect in those cases in which the agency specifies that "national security" is a basis on which discharge is sought.

> (N)otwithstanding Section ( ) . . . 7532 of Title 5 . . ., the Secretary may terminate the employment of any (NSA) officer or employee . . . whenever . . . he determines that the procedures prescribed (therein) . . . cannot be invoked consistently with the national security. 50 U.S.C. 833.

Had Congress felt that a 7532 hearing was not previously required by law, it would not have used this language. It is thus clear that the 7532 procedures govern (absent invocation of Sec. 833, which requires a finding by the Secretary of Defense that all other procedures are "not consistent with national security").[13]

To the same effect is Section 832(b) of 50 U.S.C., which establishes Boards of Appraisal. In that Section, Congress made it clear that "appraisal by such a board is not required before action may be taken under section ( ) . . . 7532 . . ." Accordingly, Congress again expressly recognized the prior 7532 hearing requirement. Thus, there exist not one but two examples in subsequent legislation expressly recognizing 7532 procedures. This Congressional recognition is patently inconsistent with the Government's position that the 1959 NSA Act somehow did away with Section 7532 termination procedures.

The National Security Act of 1950 contained the requirement of a hearing when the Department of Defense attempts termination in the interest of national security. The 1959 NSA Act nowhere expressly adverts to termination authority. Accordingly, the Government must argue a repeal of the express requirements of 7532 by implication stemming from the power to appoint. As the Court of Appeals pointed out, such a repeal by implication is not favored by the courts. Indeed, the very

[13] There, of course, was no such invocation or finding in this case.

existence of DoD Directive 5100.23 (May 1967), Subsec. 10, or NSA/PMM Chapter 371.1 (July 1976) evidences that even Petitioners did not consider such a repeal by implication to have taken place. Accordingly, the Department of Defense and NSA, by formal promulgation of regulations, disavow the Government's position in this case.

7. The legislative history of 7532 clearly addresses the mandatory nature of the right to an appeal and a hearing available to Department of Defense employees. Whereas 5 U.S.C. 7532 expressly indicated there was to be no change in pre-existing dismissal authority at the Atomic Energy Commission (5 U.S.C. 7533), H.R. Rep. No. 2330, 81st Cong., 2d Sess. 3 (1950) states as follows:

> Under the present law, with respect to (Department of State and Defense), the officer or employee who is suspended or terminated as a security risk is not entitled, as a matter of right, to an appeal to the head of the agency concerned. *This legislation extends this appeal to employees (of these agencies).* (Emphasis added.)

Congress thus intended that 7532 procedures were mandatory in "security risk" cases and not merely a distinct procedural option available to the Department. Acceptance of the Government's argument here is intolerable in that it would subvert the application of any 7532 rights of all non-veteran excepted service employees in government in every instance at the whim of the Director of the NSA or other respective Government official. If the Petitioners "for cause" arguments are accepted, there will never be an instance at NSA where a 7532 hearing takes place. Since a security clearance is a prerequisite to NSA employment, a mere recitation of Ch. 370 for cause termination procedures (rather than Ch. 371 - national secur-

ity) in the notice of termination will effect an end run around the clear Congressional dictates of Section 7532.

8. Petitioners' brief (pp. 27-31) cites other legislative history, arguing that Section 7532 was intended (a) to give agency heads the power to take immediate personnel action; (b) to be used sparingly and in exceptional cases; and (c) "to *increase* the authority of heads of Government departments" and not "to provide" protections for "employees who do not otherwise have statutory tenure . . ."

In response it is initially necessary to point out that courts need not and should not turn to legislative history if the meaning of legislation can be gleaned from the face of the statute. *Caminetti* v. *United States*, 242 U.S. 470, 490 (1917); *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929); *Wilbur* v. *United States*, 284 U.S. 231, 237 (1931); *Long* v. *Stenson*, 465 U.S. 886, 896 (1983). As shown above, a hearing by an agency authority, duly constituted for the purpose, is plainly required in national security cases. There is no need to turn to the oft confusing legislative histories of the statutes at issue here.

If this Court, however, feels that extensive legislative history must be examined, the following four considerations of Congress, all favoring Respondent's position here, preponderate:

(i) *Congress thought the 7532 hearing right would be accorded all employees accused of being security risks.* Senate Report No. 2158, 81st Cong., 2d Sess. (1950), p. 2, states:

> The purpose of the bill is to increase the authorities of the heads of government departments engaged in sensitive activities to summarily suspend employees considered bad security risks. * * *

There is no indication that the rights of an employee in this bill were for exceptional circumstances or not to apply across the broad. Also see H. R. Rep. No. 2330, 81st Cong., 2d Sess. (1950) quoted *infra* at pp. 22-23. Also see hearings before the Committee on Post Office and Civil Service, H. R., 81st Cong., 2d Sess. H. R. 7439 (U.S. Sup. Ct. Lib. Index Ref. 6794). On page 11, the question was raised as to whether the proposed rights extended to protect employees in the excepted service or "unclassified employees." The answer was a definite "yes." At this hearing, Capt. McDill testified on behalf of the Department of Navy and Department of Army. Some of Congressman Karst's questions and Capt. McDill's answers are on page 21 as follows:

> * * * I take it that you would have a choice, if you're going to use it or not use it; is that what you thought?
>
> *CAPT. McDILL.* No, sir; but it applies more particularly to the individual who has access to classified material, who is in a position to obtain it, and through deterioration of habits, or unrevealed characteristics at the time of his employment, is addicted to dropping the news or dropping the information around.
>
> *MR. KARST.* In otherwords, if this law passed, you would not have a choice of using one procedure or another, and you would not proceed with this law right on down; you do not have a choice, do you?
>
> *CAPT. McDILL.* No, sir; not in the case of clear security risks. We would use this law, and do use it; * * *

The debates in the Congressional Record of the 81st Cong., 2d Sess., provide similar indications of the absolute right to appeal in these circumstances. See comment of Congressman Rees at 96 Cong. Rec., p. 9618:

> During the hearings on this legislation, certain witnesses stated that the legislation should contain provisions providing for an adequate appeal to make certain that no civilian employee is dismissed arbitrarily without sufficient evidence that such employee is a security risk.
>
> These views were taken into consideration and the bill provides the following rights for employees who are suspended as security risks, but before their termination.

Thereafter, the Congressman listed the employee rights at issue here. At 96 Cong. Rec. 10016, Congressman Murray of Tennessee listed the hearing and rights to review by the head of the department and said they applied to "*any* suspended employee" who was to be terminated.

Congressman McCarthy stressed that employees' rights should be recognized. At Cong. Rec. 10027, he stated:

> It is very clear to me that no citizen has the right to say, "You must give me a Federal job" when no job exists, but when a man does take a Federal job, when he serves in it faithfully and loyally and over a period of time according to the Civil Service regulations, he does possess certain rights, and I think that the Congress should recognize the existence of those rights as its moral responsibility to sustain them.[14]

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[14] In addition, with reference to the 1964 Act, 50 U.S.C 831-835, Congress later gave summary termination authority to the Secretary of Defense with respect to NSA security risks. In H.R. No. 108, 88th Cong., 1st Sess., pp. 4 and 5, the proposed new extraordinary authority is referred to in the following context:

> (T)his authority shall be exercised only upon a determination by the Secretary of Defense that the normal removal procedures involving *appeal rights* cannot be applied consistently to national security. * * * (Emphasis supplied.)

In the congressional debate on H. R. 334 (the 1964 Act), 109 Cong. Rec., 8132, Congressman Johansen stated:

> It does not alter the fact that NSA is part of the Department of Defense, is generally subject to overall Defense Department regulations controlling dismissal of employees and is also generally subject to Executive Order 10450, the security directive issued by President Eisenhower which provides for notification, *hearing*, right of counsel, and so forth, for an accused employee. *This is and under H. R. 950 will continue to be the procedure normally followed by NSA in terminating employment of personnel adjudged to be security risks.* (Emphasis added.)

(ii) *Unintentional minor indiscretions as opposed to disloyalty were intended to trigger 7532 procedures.* In the hearings before the Senate Committee on Armed Services 81st Cong., 2d Sess. on H. R. 7439, this distinction was made manifest. Mr. Larkin of the Department of Defense said, at page 8:

> (B)ut some of those employees, while loyal or while there is no proof that they are disloyal, are of such characteristics or of such personal traits that it is dangerous for them to work in the sensitive job.
>
> So that what we try to do is if we find a person, we have no proof that he is disloyal—
>
> *SENATOR BRIDGES*. People like a drunkard or a sexual pervert?
>
> *THE CHAIRMAN*. Or a person who talks and talks and talks.
>
> *MR. LARKIN*. Or a person who associates with persons who belong to the Communist Party or any of the agencies on the Attorney General's list, but against whom there is no proof he is a Communist as such himself but who by virtue of his continual association becomes a tremendous risk for us to keep in a sensitive job where he is continually every day getting highly classified material.

And see H. R. No. 2330, 81st Cong., 2d Sess., p. 3:

> When an employee has committed an indiscretion or his pattern of conduct or personal habits leads to the conclusion that he is likely to be a poor security risk, the responsibility for deciding and taking the proper action rests with that Secretary.

See Senate Report 2158, 81st Cong., 2d Sess., p. 2:

> This bill is concerned primarily with the problem of dealing with those Federal employees who, although loyal, are so careless as to jeopardize the national security.

See Senate Report 1155, 80th Cong., 2d Sess. 2 (1948) on the previous proposals for the legislation containing Section 7532 (eventually passed in 1950) under "Explanation of Amendments," the following language appears:

> According to testimony developed in the hearings, all the agencies feel that they can and will handle loyalty questions under the Executive Order, and that this bill will primarily cover cases of indiscreet employees who are a bad security risk.

It was also apparent from the Hearings before the Committee on Post Office and Civil Service on H. R. 7439, *supra*, that indiscretions, as opposed to treason or disloyalty, were the primary object of the 1950 legislation. At page 4, there appears a discussion of the problem in the law existing at that time that was sought to be remedied:

> There is no provision contained therein whereby a person may be removed who on the one hand is absolutely loyal, but on the other hand is dangerously indiscreet. The indiscretion of a loyal employee can result in just as complete and damaging a compromise to national security as the actions of a disloyal employee.

To the same effect, see page 71 of that same report and 96 Cong. Rec. 10025, statement of Congressman Corbett.

(iii) *Review by the agency head was intended as an integral employee right and was a crucial compromise to avoid outside Civil Service Commission review.* A review of H. R. Rep. No. 2264 and S. Rep. No. 1155 of the 80th Cong., 2d Sess. (1948) shows a vigorous debate as to whether or not an employee about to be terminated as a security risk would have an independent review by an outside board such as the Civil Service Commission. This debate was carried to the 81st Cong. and vigorous opinions were expressed. See generally 96 Cong. Rec., 10015-10034. Amendments espousing outside review were unsuccessful. However, the certainty of an appeal to the agency head was argued to be an effective compromise between the rights of the employee and the interests of national security.[15]

Congressional concern is exemplified by the statement of Congressman Holifield, *Id.* 10021:

> What are you doing here? You're widening the field for discharging an employee, to include a vague term called a "security risk," not disloyalty, but a security risk. Now, what is a security risk? Well, the Undersecretary of Navy, Mr. Kimball, said it might be due to a person's associations, to his affiliations, to his habits or to some indiscreetness.
>
> Who is going to judge whether a man's habits are good or bad? Who is going to judge whether a man is

---

[15] See, e.g., comments of Congressman Hagen, 96th Cong. Rec. 10018 as to repeated attempts at amendment in this regard. Also see comments of Congressman Miller of California, at 10020, and see p. 10023, proposed amendment of Mr. Miller.

discreet or not? What are the standards of that judgment?

> So here in effect you give to the head of the agency or his subordinates the right to fire an individual for security risk reasons without giving that man an appeal. It says in the bill that he has an appeal, but he can only appeal to the head of the agency which fires him. I submit that is not the proper kind of an impartial appeal that a man needs if his job is being taken away from him.

The concerns of these congressmen was assuaged by the assurance that the agency head could provide a proper review (96 Cong. Rec. 10032):

> *MR. CANFIELD.* I wonder if the gentleman would be good enough to tell us who, under the bill unamended will be the final arbiter in the Department of State as to the dismissal of these employees?
>
> *MR. CHELF.* As I have said, we have to trust our elected or selected administrators of our Government agencies. However, we ought to here and now serve notice upon each and all of them that the Congress not only expects but demands that its will be done and that this and all other laws, especially pertaining to this Nation's security, are strictly enforced to the letter, because at the moment the very lives of our GI's in Korea are at stake.
>
> No honest, loyal, patriotic Federal employee has any need to worry about this legislation. * * *[16]

[16] The debate of the 1964 Act, providing for Secretary of Defense summary termination at NSA, reveals that Congress clearly believed that there was an existing right to appeal to the head of the agency under the 1950 legislation. See the comments of Mr. Lindsay, 109 Cong. Rec., p. 8141:

> (Mr. Alger) has put his finger on it when the gentleman talks about central power and the dangers of central power. When you collect this amount of arbitrary power with no review, no hearing, no check, no appeal, then you have got something to be afraid of. I would urge the gentleman from Texas, however, to support this amendment that is now pending. That amendment seeks only to reinstate the hearing procedures contained in Title V of United States Code. These procedures do not require direct confrontation. The Government does not have to give up any secrets. Title V of the Code provides that when an employee receives notice of dismissal, he has right to a written statement summarizing the charge. He has an opportunity to reply in writing within thirty days, and he is given a hearing. He has a right to appeal to the head of the agency.
>
> Mr. Chairman, the gentleman from Texas (Mr. Alger) asked that there be a review board. There is already a provision in Title V that there be a review by the Agency head. This is all that we ask. Is it too much to ask for minimum due process in this regard? * * *

(iv) *The political accountability of the agency head was intended to insure fairness and independence in the appeal process.* In the Hearings before the Senate Committee on Armed Services on H.R. 7439, *supra*, Mr. Larkin, the representative of the Secretary of Defense, answered the Senators' concerns about the exercise of arbitrary and capricious powers in terminating so-called "security risks" (at page 20) as follows:

> You give him full responsibility as Chief Executive of his department, a Presidential nominee, confirmed by the Senate. You give him full responsibility for preserving the integrity of the confidential information in the department, and he has to have some kind of authority to fulfill that responsibility.

And then, at page 21:

And see 109 Cong. Rec. 8142:

> *MR. ASHLEY.* . . . I would like especially to commend the gentleman from New York (Mr. Lindsay) for making it clear that under existing law a security risk can be dismissed but still have appeal and review rights which in no way jeopardize national security. What Section 303 does in the bill under consideration is to strip those rights of appeal and review. * * *

> Now before he is terminated, the Secretary of Defense himself must take the action. * * *

In S. Rep. No. 2158, 81st Cong., 2d Sess. (reported in 1950 U.S. Code, Cong. Serv. 3278 at 3280), the non-delegability of termination power was emphasized as follows:

> It is the intention that the head of a department can delegate his authority to suspend an employee but he cannot delegate his power to terminate the services of an employee. * * *

In the hearings before the Committee on Post Office and Civil Service, H. R. 81st Cong., *supra*, the following took place at page 47:

> *MR. MILLER*. Would the right to such an appeal or the knowledge of such an appeal existing be a deterrent to the frivolous use of this authority by people in the agencies? Do you not think that is true?
>
> *MR. WALTERS*. Definitely. * * *

Similarly, in the House hearings before the Committee on Post Office and Civil Service on H. R. 7439, *supra*, Capt. McDill, the representative of the Departments of Navy and Army testified at page 21 as follows:

> I understand your question, Mr. Miller, to be addressed to the so-called spite case. Yes sir, in my opinion, the bill does provide adequate protection, because we have an agency head appeal, and it would be very difficult to bring up to the agency head false, fraudulent, or spurious testimony based on spite.
>
> * * *
>
> *CAPT. McDILL*. Knowing that the procedure exists, I should think that anyone addicted to spiteful testimony or spiteful habits would be reluctant to proceed if we had to justify them before the agency head.

Again, in the debate on the 1950 Act, the protections in 7532 were emphasized as adequate. See the comments of Congressman Kilday, 96 Cong. Rec. 10026:

> Now, you are talking about an appeal. There is an appeal provided to the head of the agency. That means a man in the Department of the Army could go to the Secretary of the Army, a man in the Navy, to the Secretary of the Navy, and in the Air Force to the Secretary of the Air Force, and so on. Do you not regard that as considerable protection? You grant to those officers powers far broader than these. They have today the actual decision for the drafting of men into the service. Of course, it comes in the name of the President when it is invoked, but when the quotas come up they come from these Secretaries. So you are going to say that the man who has the power to say that the sons of American parents shall go into the service, shall go into combat, is not to be trusted in passing upon whether a man is a poor security risk. You have granted him those additional powers, and I do not see why you would hesitate to say that appeal to him is not proper protection.
>
> The gentleman from California (Mr. Miller) stated that at the lower levels they were subjected to vindictive and capricious actions; but when you get to the higher levels, when you get to Washington, when you get all the way up to the top of the department you appeal to a man who has far greater powers than those in the lower levels. He certainly would not act capriciously with the individual involved. Why should you worry about giving him this additional jurisdiction?

At 96 Cong. Rec. 10028, Congressman Thornberry stated:

> Let us have confidence. We have to trust somebody. Let us trust the Secretary of National Defense and the Secretary of the Army and the Navy and the Air

> Force and the Head of the Atomic Energy Commission, and at least say to them, "We are taking the chance that you will deal justly with these poor security risks in behalf of the American boys who are now going out to die on foreign soil." Let us not be tying the arms of men behind their backs by trying to make it easy for poor security risks.

At the same page of the Congressional Record, Congressman Murray appealed to the House to vote down the amendments calling for Civil Service Commission review by stating as follows:

> Are we going to say to the Secretary of War and the Secretary of the Navy, and the Secretary of the Air Force, "Well, it is true that you have given this employee a fair hearing. It is true you have passed carefully upon the charges. It is true that you have found the employee to be a bad security risk, and yet you must go before the Civil Service Commission so that that Commission can substitute its judgment for your judgment as to who is or is not a bad security risk.
>
> Do you not have enough confidence in the Secretary of Defense and the Secretary of the Army and the Secretary of the Navy and these other defense heads to let them pass finally on these security risks? * * *
>
> I appeal to you to vote down these amendments.

96 Cong. Rec. 10029:

> *MR. MURRAY.* * * * I take my stand with the heads of our defense agencies and I am willing to trust the good judgment of our Secretary of Defense - Navy and Army - and other defense heads about discharging these poor security risks. * * *

B. *Egan* v. *Department Of Navy* Does Not Control This Case And Is Distinguishable.

Egan v. *Department of Navy,* No. 86-1552 (U. S. Supreme Court, Feb. 23, 1988) and the lower court decisions in that case (28 M.S.P.R. 509 (1985), *rev'd* 802 F.2d 1563 (Fed. Cir. 1986)) are repeatedly cited in the Government's brief as authority that 7532 should not be mandatory. For several reasons, *Egan* does not control and is distinguishable:

1. Footnote 7 in *Egan* clearly indicates that this Court did not decide the issue in this case: "This court will meet the issue in *Doe* when it comes to it." The footnote went on to say that *Egan* was decided "on the parties' assumption that Section 7513 was available to the Navy in this case and then it proceeded thereunder." (Slip Op. 13.)

2. In *Egan*, there was never an argument made that Section 7532 was directly applicable. Rather, as indicated at Slip Op. 13, the employee attempted only to draw an inference by arguing that, if no substantive review of the security clearance denial could be available at a 7513 hearing, Section 7532 would constitute a compelling "anomaly" by giving the employee more protections than Sec. 7513. Rejecting this argument, the Court indicated it did not accept its lynchpin, that Petitioner had more procedural rights under Section 7532. Thus only tangential attention was paid to 7532 by this Court and *Egan* does not represent any direct holding on applicability of 7532.

3. The major distinguishing factor was that *Egan* never attained unconditional employment with the Department of the Navy. He was a "new hire" and it is clear from the facts that at all times his obtaining a secur-

ity clearance was a "condition precedent" to employment. Accordingly, although he did work for a period of time, he never fully complied with the prerequisites of his position, and as the opinion points out, he performed "only limited duties and was not permitted to board any submarine." (Slip Op. 2.)

Egan's status is thus clearly distinguishable from Respondent's employment status here. (See 5 U.S.C. 7532(c)(1) and (2).) Doe promptly obtained his security clearance and was employed with NSA for a period of sixteen years with overall rating of "Excellent" for the years 1978-1980 and "Outstanding" for 1981 (C.A. App. 6-7 and 16-17). Egan never obtained full employment status, and it is understandable that even his own counsel assumed that "termination" or "removal" under Section 7532 was not applicable since he never obtained his security clearance. Obviously quite a different situation exists with an employee who has been cleared for over fourteen years before there is the first thought of an allegation that his continued employment is not consistent with the interests of national security.

4. Egan was a Veterans Preference Eligible and thus had appeal rights to the Merit Systems Protection Board under 5 U.S.C. 7513(d). Respondent, a non-veteran in the excepted service, had no right to independent review other than Section 7532. In never seeking a Section 7532 review, Egan obviously considered the MSPB his only avenue of appeal. The case did not purport to consider the right to agency review under 7532 of a non-veteran in the excepted service.

5. Finally, the Petitioner's brief citing *Egan* argues repeatedly that one in Respondent's position at NSA receives fewer procedural protections under Section 7532

than under Chapter 370 of NSA's regulations. While the *Egan* majority's view that an MSPB hearing gave more protections than 7532 may have had logical significance in rejecting the employee's arguments based on inference in that case, Respondent respectfully submits that whether NSA regulations give more or less protection than 7532, such can logically have no bearing on whether or not Congress mandated a 7532 hearing for security terminations. There is nothing in the language of 7532 to suggest that employees' entitlements thereunder are contingent upon the existence of other agency regulations, *vel non*.

Indeed, Respondent views a 7532 hearing at the Secretary of Defense level as providing a desirable independent review of the propriety of his termination.[17] His treatment at the hands of the Board of Appraisal and the Director of NSA in this case was in his view procedurally unfair. After a favorable psychiatric report, the Board succeeded in obtaining an adverse report from the same psychiatrist without re-examination of Respondent. (Compare C. A. App. 102-105 with C. A. App. 109-117.) Having been served with notice of removal based on specific acts (C.A. App. 82-84), Respondent litigated administratively, and apparently convinced the Director that the acts charged were an insignificant security risk. This was to no avail since the Director removed him on the basis of his overall lifestyle—a cause for termination with respect to which he had no notice. (C. A. App. 192, Para. d.)[18] In Respondent's view, such obvious unfairness would

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[17] This would provide for a review of the substantive basis for denial of security clearance, thus avoiding the basic problem of a security review outside the Department of Defense that was the major concern in *Egan*.

[18] See page 7 of the Statement of Facts in this brief, the crucial paragraph "d" of the Director's decision.

be remedied at a Department of Defense hearing and review by the politically responsible head of the agency who is accountable to the President and Congress.

The "less protection under Section 7532 argument" was rejected by three members of this Court in *Egan*. See dissenting opinion of Justice White joined in by Justices Brennan and Marshall. As indicated in footnote 2 of that dissent, Section 7532 is not "harsh and drastic." One terminated thereunder may be re-hired "in the discretion of the head of the agency concerned" and the Secretary of Defense need not act "personally" since he may finally review discharge decisions through a "designee." Section 7532(c)(3)(D).

Finally, as a long-range theoretical matter, to hold that the statutory hearing right under 7532 is inapplicable because of the existence of NSA Ch. 370 termination regulations, is to relegate all security case procedural protections to the will of the Director of NSA. Presumably, in the future, he can revoke his own regulations and leave non-veteran excepted service employees with no procedural rights at all. Absent the repeal of Section 7532, Congress cannot be deemed to intend such a result.

III. PLAINTIFF WAS IMPROPERLY DEPRIVED OF PROCEDURAL PROTECTIONS AFFORDED BY INTERNAL REGULATIONS OF THE DEPARTMENT OF DEFENSE AND NSA.

The Petitioners argue that an employee of the National Security Agency, who fails to maintain a required clearance for access to classified information, may be removed "for cause," without invocation of 5 U.S.C. 7532 or 50 U.S.C. 833. Insofar as NSA purported to use the provisions of Chapter 370 of its Personnel Management Manual to effectuate Respondent's removal (C.A.App. 82), the

question arises whether Chapter 370 can be used to masquerade what is really a dismissal in the interest of national security.

Petitioners' "for cause" argument (Br. 18-22) relies heavily on the statutory standard Congress established in 50 U.S.C. 831. Their brief in this Court (p. 19) reads:

> Clearance for access to SCI is a continuing requirement for employment at NSA. Section 831 provides that "no person shall be employed in *** the National Security Agency *** *or continue to be so employed* *** (or) have access to any classified information ( ) unless such employment *** or access to classified information is clearly consistent with the national security." ***

Chapter 370 should not be used to carry out a removal under the aforesaid statutory standard, which clearly involves the national security. Chapter 370 does not provide for implementation of the statutory requirements of 50 U.S.C. 831, *et seq*. Section 3-2 of Chapter 370 expressly excludes the statutory standard of 50 U.S.C. 831, *et seq*. by stating that it does not apply to "a suspension or removal taken in the interest of national security" (Pet. App. 38a).

We submit further that the aforesaid standard provided by Congress is clearly implemented in another NSA regulation promulgated, but not followed by NSA in the removal of Respondent, in Chapter 371 of the NSA Personnel Management Manual 30-2. (Opp. App. 9b-15b). The title page of Ch. 371 and Section 1-1 states that

> This chapter prescribes policies and procedures governing actions to limit access to classified information, suspend and/or terminate civilian personnel of the National Security Agency for reasons of national security . . . .

Section 1-2 provides that the regulations in Chapter 371 are "in accordance with, and pursuant to, the authority and requirements" of P.L. 88-290, which is codified at 50 U.S.C 831 and, as shown above, contains the very statutory standard Petitioners erroneously seek to use as "for cause" under Chapter 370. Chapter 371 contains the identical language of the statutory standard in its Section 1-3.a; but 370 has not a word about it. Nor does 370 provide for the use of Boards of Appraisal pursuant to 50 U.S.C 832; but 371 does provide for such Boards of Appraisal at Sections 1-3.b.(3) and 1-5. In addition, Chapter 371 implements the requirements of 5 U.S.C. 7532. (See 371.1-2.a; C.A. App. 228.)

In view of the foregoing, we submit that, in proceeding under Chapter 370 rather than Chapter 371 of its personnel regulations, NSA did not adhere to its own regulations and deprived Respondent of important procedural rights guaranteed by previous decisions of this Court) (*Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v.*Dulles*, 354 U.S. 363 (1957)) and due process rights guaranteed by the Constitution (*Greene* v. *McElroy*, 360 U.S. 474, 507-508 (1959)).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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